

Part 201 Phase Two Discussion Group Project Charge

Project Purpose

DEQ Director Steven Chester initiated the Part 201 Discussion Group process to seek recommendations from interested and affected parties about needed changes in Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA). Michigan's cleanup and redevelopment program has been operating under the most recent statutory framework since June 1995, and is currently administered by the Remediation and Redevelopment Division (RRD). Over the years, the program has undergone a number of statutory changes including a shift in the liability scheme from a strict liability standard to a causation-based standard, establishment of due care requirements for non-labile facility owners, and the provision of more flexibility for remedies by offering land-use-based closure options. The department recognizes that the cleanup and redevelopment program must continue to evolve in order to be effective in meeting its objectives of protecting public health, safety, welfare, and the environment while concurrently promoting brownfield redevelopment.

The Phase Two Discussion Group is tasked to help us identify opportunities to increase the number of cleanups conducted, increase compliance rates, make the program easier to implement, and assure that the best tools and strategies are available to facilitate brownfield redevelopment. Recommendations for changes may cover procedures, policies, and statutory and rules changes, but must not compromise the program's ability to protect public health, safety, welfare, and the environment.

It is important to recognize that, while the Remediation and Redevelopment Division of DEQ is the central focus for the state's cleanup program, remedial actions are overseen by staff in a number of DEQ programs. Waste and Hazardous Materials Division, Water Bureau, and the Office of Geological Survey all provide oversight for remediation being done to address facilities they regulate. Landfills; hazardous waste treatment storage and disposal facilities; oil and gas development operations; and illegal groundwater discharges are examples of facilities that are primarily regulated by programs outside RRD. Remedial actions overseen by the other organizational units are required to comply with Part 201. As you can see, the Part 201 program is an integral part of the department's environmental programming, and is critical to the department's mission to protect public health and environmental quality.

Structure of Discussion Group Meetings

The process will operate with four subgroups to address the following issues:

- Liability
- Complexity/technical requirements
- Program administration
- Brownfield redevelopment

In order to ensure an objective process, the Discussion Subgroups will be led by facilitators from Public Sector Consultants. The meetings will be open to the public and will include time for public comment either before or at the conclusion of the meeting.

Each subgroup will meet approximately five times. A plenary kickoff meeting and a concluding meeting will be conducted. The process is expected to take approximately six months.

Each group will be directed by a facilitator who will be responsible for calling meetings, recording the proceedings in a manner that establishes and maintains momentum in the discussion, eliciting feedback from all participants, and providing feedback to DEQ on an ongoing basis about the subgroup's progress.

DEQ staff will participate in each subgroup discussion, and there will be DEQ staff available as well to help answer questions and explain current program implementation practices and challenges. This is also an opportunity for DEQ staff to understand various perspectives and program performance expectations from Discussion Group members.

The overall project will conclude with a report, to be prepared by Public Sector Consultants, which summarizes the recommendations of the subgroups and presents them to Director Steven Chester. The final report will include discussion of any recommendations that overlap the subgroups and that may need to be reconciled.

Issues for Subgroup Consideration

The DEQ has developed a list of issues for the Phase Two Discussion Group to consider that synthesizes the work of the Phase One Discussion Group with program implementation issues raised by DEQ staff (see Attachment A). This list is intended to provide a macro perspective of program issues to facilitate integration of the more detailed issues presented in the Phase One Discussion Group issue list (see Attachment B). The subgroups will be asked to consider both the Phase One Discussion Group and RRD issue lists in their deliberations, plus issues that participants raise or that may be raised during public comment at subgroup meetings. It will be up to the members of the subgroups, with the help of the facilitator, to bound the topics being discussed and allocate the available time appropriately.

No recommendation or topic is out of bounds for the Discussion Group's deliberations.¹ Creative solutions are expected and encouraged. However, in light of the limited time available for the process, and the need to produce practical recommendations, participants are encouraged to consider the implementability of all ideas they consider. If a particular option or recommendation would require new resources in order to implement, that fact should be acknowledged (and an estimate of the resources provided, if possible) in the subgroup's recommendations.

¹ Discussion of specific mechanisms to provide stable funding for the cleanup and redevelopment program is not intended to be the subject of detailed discussion in the subgroups. The DEQ is working with other agencies in the administration to develop long term funding strategies. A general recommendation about the need for long-term funding for the program can be a part of the final report.

Summary of Activities Leading to the Discussion Group Process

In early 2005, the RRD invited a small group of individuals with experience in various aspects of the cleanup and redevelopment program to provide input as the first phase in a planned Discussion Group process of seeking broader stakeholder input. The Phase One Discussion Group met a dozen times between April and November 2005 and developed a list of "Characteristics of a Successful Cleanup and Redevelopment Program" (Attachment C), as well as a summary of recommendations for the proposed Phase Two Discussion Group, including the subgroup framework (Attachment B). Specifically, the Phase One Discussion Group recommended that a larger group be convened to enhance future program improvement discussions. Four subject matter subgroups were suggested.

Coordination with Other Program Development/Reform Efforts

The focus of the Discussion Group will be improvements to Part 201. Discussion Group participants are asked to be mindful of the fact that the legal framework of Part 201 and the associated cleanup requirements also are the basis for cleanup work done in conjunction with other state regulatory processes including Leaking Underground Storage Tanks (Part 213 of the NREPA), Hazardous Waste Management (Part 111 of the NREPA), and Solid Waste Management (Part 115 of the NREPA).

Other policy and program development initiatives will be occurring concurrent with the Part 201 Discussion Group. These efforts include:

The Refined Petroleum Cleanup Advisory Council (Advisory Council), which was created in 2004 as part of amendments to Part 215, Refined Petroleum Fund, of the NREPA. The Advisory Council is required by law to make recommendations to the governor and the legislature on a refined petroleum cleanup program that provides for corrective action to address releases of refined petroleum products, including provisions designed to benefit owners and operators of leaking underground storage tanks and also to provide for corrective action at sites where the liable party is unknown or insolvent. Its recommendations are expected by December 2006. The DEQ anticipates that major revisions in Part 213 and Part 215 will be needed.

- The DEQ Environmental Advisory Council (EAC) is currently reviewing issues associated with land application of industrial byproducts, composted materials, and other forms of solid waste. The EAC was asked by Director Chester to evaluate these issues after a stakeholder process conducted by the DEQ Waste and Hazardous Materials Division was unsuccessful in reaching consensus on how the solid waste regulatory process should be modified to address land application. It is likely that linkages between the land application regulatory framework and the cleanup program will continue to exist.

The Part 201 Discussion Group is not expected to monitor or necessarily account for developments in these other processes; however, some Discussion Group participants were selected, in part, because they are also serving on the Advisory Council or the EAC. Those Discussion Group participants are invited to share information about the

proceedings of the other groups, especially as it may be relevant to the activities of the subgroups.

Expected Outcomes and Next Steps

The goal is for a final report and recommendations to be presented to Director Chester by April 2007. If conflicting recommendations emerge in the final report, Public Sector Consultants will include a discussion of those conflicts in the report. If necessary, Public Sector Consultants and/or DEQ staff may confer with Discussion Group participants after the conclusion of the scheduled meetings to attempt to reconcile conflicts. Director Chester and DEQ staff will review the recommendations at that time and determine how best to pursue program changes. The timing for implementation of program change will be determined after this review.

PART 201 DISCUSSION GROUP DEQ Issue List for Phase II

Introduction

Michigan's industrial history has left a legacy of contamination in soils, groundwater, and river and lake sediments. This legacy continues to effect Michigan's quality of life through impacts on human health, safety and welfare; property values and redevelopment potential; and impairment of public trust resources, including drinking water and productive land. Michigan was one of the first states to recognize and address the need for state-funded response activity and many successes have been realized. Michigan has provided public funding to address immediate public health, safety, and environmental threats at thousands of sites. State funding has also readied hundreds of sites for redevelopment through grants and loans to local government, plus projects undertaken directly by the DEQ. Private interests have invested aggressively in redevelopment in Michigan, helped by causation-based liability provisions that are unique among the states, and by land use based cleanup options that allow cleanup objectives to be matched with the planned development. Liable parties are able to avail themselves of a broad range of options to establish compliance with cleanup requirements. Michigan's cleanup and redevelopment program is nationally recognized for its innovative features.

In spite of those successes, the DEQ estimates that there are still tens of thousands of contaminated sites in Michigan that have not been inadequately addressed. The causation liability scheme for owners and operators has done much to facilitate redevelopment but it has also complicated efforts to secure prompt and appropriate response actions from liable parties. For example, properties that change hands many times while there is continuing hazardous substance use, making it difficult to establish the proofs required to support action against liable owner/operators. Specific affirmative obligations and broad freedom for liable owners and operators to conduct cleanups without state involvement or approval were intended to maximize the rate of cleanups achieved after the 1995 amendments to Part 201. The reporting provisions of Part 201 give the DEQ extremely limited information on which to judge rates of compliance for liable parties (for their remedial obligations) and for all owners and operators of contaminated property (for their "due care" obligations). However, anecdotal observations lead the DEQ to conclude that parties are not taking action to address conditions for which they are liable in a timely manner. Further, the level of knowledge about and compliance with the more limited "due care" obligations, which apply to any person who knows his or her property is contaminated, also appears to be inadequate.

Program implementation challenges include a declining budget for the program, and new scientific evidence supporting the need for changes in exposure pathway considerations to adequately protect public health, safety, welfare and the environment. These things exacerbate the challenges of the program to ensure timely site clean up and adequate management of health, safety, and environmental risks. In addition, the flexibility provided by land use based categories of cleanup, including numerous options to control exposures to contamination left in place, has resulted in liable parties pursuing remedial strategies that do not remove contamination sources. It appears that liable parties do not recognize (or are not motivated to consider) that the costs of continued monitoring and maintenance of such controls will often exceed the costs of more active contaminant removal in the long term. In

addition, leaving contamination on site undermines the ability of liable parties to achieve closure finality. The tension between regulatory finality and on-going risk management obligations is a major issue that appears to delay liable party actions.

The quality of information collected and presented to the agency is a continuing impediment to timely cleanup of contaminated sites. It seems reasonable to conclude that the documentation of response actions that are never reviewed by the DEQ is equally incomplete and inaccurate. It is often the case that appropriate remedy selection and risk management decisions cannot be supported by site characterization information provided to DEQ. Some examples of these problems raise fundamental questions: exposure pathway evaluations are incomplete; acute hazards are not recognized and addressed; reports depict incorrect groundwater flow direction based on data submitted; monitoring wells are not installed at proper locations or screened at proper depths to adequately a contamination plume; applicable or relevant and appropriate regulatory requirements are not properly identified. It is critical that program requirements are clear and complete enough to minimize these kinds of errors.

The cleanup and redevelopment program needs a different balance of incentives and disincentives to assure high rates of compliance, timely cleanups, and appropriate brownfield redevelopment.

The following sections outline issues that DEQ staff has identified as being necessary to address in order to make the cleanup and redevelopment program optimally effective. For each subject group, questions include both broad issues and details that have substantial impact on program functions.

LIABILITY/COMPLIANCE

- How does the causation standard affect the timeliness of cleanups and management of risks at facilities?
- Would changes to the causation standard, or in obligations imposed on liable parties, enhance the pace and number of cleanups?
 - Identification of facilities (reporting/disclosure)
 - Identification of liable parties
 - Clarification of liable party affirmative obligations
 - Source control
 - Site characterization
 - Interim actions
 - Additional response activities
 - Fixed time periods for completion of liable party obligations
- Is the BEA process an effective and reliable means to distinguish new releases from existing contamination in the context of property transfers?
 - What other processes could more effectively and reliably provide liability relief to non-responsible purchasers and occupants of "facilities?"
 - What other processes could result in identification and disclosure to DEQ of "facilities," either in relation to property transactions or more generally?

Attachment A

- What process changes could focus pre-acquisition environmental inquiry on the collection of information necessary to identify and implement appropriate “due care” actions?
- What “due care” process improvements can be made to ensure that facilities are used in a manner that is protective? (Including long-term ownership, not triggered by property transactions.)
- Should the statute of limitations provisions in Part 201 be modified? Recent court decisions will significantly limit both state and private party cost recovery actions. These decisions are a major disincentive to parties who would otherwise take actions with an expectation that they can recover costs from liable parties. They also make it difficult for the State to assure that the public does not inappropriately bear remedial costs that should be paid by liable parties. The state’s ability to use liens is also hampered by recent court decisions, making it more difficult for the DEQ to respond to its mandate to recover costs from liable parties.
- Do the defenses/exemptions in Sections 20126(3) and (4) function appropriately under a causation scheme? They were designed to work with a strict liability scheme – once a person loses a defense, it is arguably unclear if they are strictly liable or liable for only that contamination they caused. Often there will not be information available to define the scope of liability when a defense is lost.
- Do the divisibility of harm and apportionment of liability provisions require clarification in relation to the causation standard for owners/operators? These provisions were also designed to work with a strict liability scheme. Implementation issues are similar to those described in the previous item.
- Is Section 20142 effective? Should it be changed? Current language is potentially difficult for regulated parties to understand in relation to owner obligations to address storm water discharges that contact waste material, Part 31 obligations that arise from owner/operator changes in facility conditions, etc.
- How can Section 20114 be changed to logically apply under a causation liability scheme? It was largely developed under the strict liability scheme and needs to be modified to clarify which obligations apply to current owners and which apply to liable former owners.
- Is it appropriate to retain the exemption in Section 20107a(4) from “due care” for a person whose property is affected by migrating contamination? Are other “due care” exemptions appropriate?
- Is there a workable remedy for failure of local ordinances or other institutional controls? This approach to remediation is not directly controllable by the party whose remedy depends on the institutional control. There may be a long gap between the time the remedy is implemented and the failure or termination of the institutional control, making it exceptionally complex to modify the remedy to address the resulting problems. Typical financial assurance mechanisms are not well suited to this situation. There may be a need for financial assurance or risk pool contributions for parties who rely on institutional controls.

Attachment A

- Does the current land use based approach to cleanup adequately reflect the public interest in land use flexibility? Is there an appropriate connection to local land use planning processes? Under the current program, existing zoning and land owner preferences are the only relevant considerations. This does not account for local plans to evolve land use over time.
- How can the current system of land use based cleanup be modified to allow for efficient and protective transitions in land use? The current system does not readily allow a remedy to be modified by a subsequent land owner/user without altering or confusing the obligations of the party who did the initial cleanup. The system needs to be able to deal with "second generation" land use while assuring protectiveness.
- Exceptions from definition of "release" do not carry over to the definition of "facility," making it difficult to interpret applicability of Part 201 to historic agricultural chemical use (e.g., arsenical pesticides), vehicle exhaust, etc. In effect, the definition of "facility" can be read to render moot the exceptions from "release" because the phrase "otherwise comes to be located" trumps the "release" exceptions. Current RRD policy may inappropriately limit applicability of Section 20107a in cases where "release" exceptions apply.
- Is it possible and/or appropriate to better align Part 201 and Part 115 with regard to relocation of solid waste? This is especially important for redevelopment projects that involve relocation of, or construction on, solid waste.
- On a related note, there appears to be virtually no compliance with the notice provisions of Section 20120c for soil relocation. This section was created to compensate when simplifying assumptions in the pre-1995 rules were eliminated but has not functioned as intended. Section 20120c and the implementing rule, R299.5542, are complex and ineffective. There may be a need to coordinate Part 201 changes with recommendations of the EAC regarding inertness and land application.
- How can documentation of compliance by owners/occupants with land and resource use restrictions be better tracked and enforced? Documentation is provided in only a small number of cases. DEQ has anecdotal evidence that restrictions are not being complied with in a significant number of cases. Continuing to rely on the current risk management system without a demonstration that the restrictions are reliable is inappropriate. Virtually no DEQ resources are devoted to this work.
- Since Section 20126(7) – related to a lender's ability to transfer ownership of property to the state -- is not functional as written, should it be deleted? Or should other laws be modified to make this provision functional?
- Section 20129(6) has been widely regarded as an interesting idea, but not an enforceable provision. Federal CERCLA case law relating to contribution protection may cast more doubt on this provision. Should it be modified or deleted? Should compliance with Section 7a be a shield to CERCLA claims?

Attachment A

- Should Section 20115a, which allows an owner/operator to elect to conduct leaking underground storage tank cleanup actions under Part 201, be modified so that it is not a "safe harbor" for a person who has neglected compliance obligations under Part 213? Should DEQ approval be required for a person who elects to proceed under Part 201 and/or Part 213? Should current compliance with Part 213 and/or Part 211 be a condition for opting to proceed under Part 201?

COMPLEXITY

- What improvements can be made in the current land use based approach to cleanup standards so that a greater number of timely, protective cleanups will result?
- Would simplification of the current land use based cleanup categories reduce complexity without inappropriately compromising flexibility and protection of public health, safety, welfare, and the environment? For example, options for simplified land use categories could be "closed" and "restricted" or "residential" and "restricted non-residential."
 - Are there ways to simplify the current risk, conditions and pathway analyses that address the reasonable and relevant exposures without compromising protectiveness?
- What can be done to ensure that sufficient and timely site characterization information is available to support sound risk-based decisions?
- Is there agreement that the program should include a requirement for immediate, aggressive action to address new releases such that impacts are minimized to the greatest practical degree?
- What can be done to require an appropriate evaluation of long term costs of allowing contamination to remain in place versus the capital costs for active remediation?
- There is no motivation for consultant to encourage clients to pursue simpler, more complete cleanup because the consultant typically makes less money from such projects. Requiring documentation of true cost over time of risk management-based remedies is a strategy to change this thought process.
- Does the current land use based approach to remedy selection adequately reflect the public interest in land use flexibility, the relationship of local land use planning with Part 201 land and resource use restrictions, and other land use questions? Under the current system, the current land owner's wishes and current zoning are the only relevant consideration. Is this prudent?
- Are there alternatives to the current system of land and resource use restrictions that can ensure remedies remain reliable and effective in the long-term to assure protectiveness?
- How will any proposed changes affect program compliance, property transactions, brownfield redevelopment and program administration?

PROGRAM ADMINISTRATION

- Are changes necessary in program administration and internal DEQ processes to ensure effective delivery of program services?
 - What are the critical program services? What are the desirable program services? (e.g., training, compliance assistance, enforcement, searchable public databases)
 - What changes can be made to improve both internal and external communication capability of Remediation and Redevelopment Division (RRD)?
- How should progress be measured and communicated to the public? Are the current statutory reporting requirements relevant and useful? (e.g., Section 20112a, Section 20105(1)(g) and (h))
 - What tracking mechanisms are in place? What additional tracking mechanisms should be considered?
 - What information is monitored, how frequently?
 - What information is shared with the public?
 - What should the program benchmarks and metrics be?
- How can the requirements of Section 20114(8), which are not optimal for either DEQ or the person submitting a plan, be improved?
- Current Site List provisions in Section 20105 were developed before the internet was a useful information management tool.
 - How can Site List procedures be revised to reflect current technology?
 - Is there a reason to maintain the concept of "site" (i.e., "site" is relevant only in relation to the list/inventory)? Should "facility" be the only term of regulatory significance?
 - Requirements for site listing notice to property owners should be clarified (e.g., who to notify when site name is "Res Wells West Avenue" and 600 properties are affected, none of which is the source property?)
- Site scores were, prior to 1995, required by law to be considered in assigning priority for public funds. There is currently no requirement for site scores to be used in any decision-making or prioritization process.
 - Should resources be used to apply a complex scoring system?
 - Is a scoring system still a relevant idea?
 - Is a comprehensive site inventory and status reporting system more important?
- Is public participation in the remedy selection process effective? How can it be improved?
- Are guidance materials effective; readily available; and responsive to staff, regulated community and consultants' needs? Are they in the most effective form? Does the RRD use the most effective delivery mechanisms? What are the most effective ways for RRD to secure input when developing guidance?

Attachment A

- Are property owners properly informed of the impacts of land and resource use restrictions that will affect their property rights and property values?
- To improve efficiency and assure fairness, should there be a schedule of fees established to clarify the compensation required to be paid for certain kinds of land or resource use restrictions?

BROWNFIELDS

- Are the existing brownfield development tools, including the 1995 amendments to Part 201 achieving the desired outcomes?
- Do we need more or different redevelopment tools (not necessarily administered by DEQ)? What resources would be required to support any new tools?
- How can coordination be improved among MDEQ divisions and other state agencies?
 - What improvements to process are necessary to allow all involved parties to respond appropriately to the time-sensitive nature of brownfield projects?
- Is it possible to use a unified format for transmittal of Brownfield Project information?
- Is it possible to enhance Act 381 and other financial incentive programs?
 - Is it appropriate to broaden the definition of "eligible facilities?"
 - What improvements can be made in the work plan review process?
 - In light of the findings that DEQ is required to make when responding to an Act 381 work plan, how can the review process be adapted to the very limited amount of information that is often available when work plans are first submitted (i.e., how can a phased review/approval process be improved)?

ATTACHMENT B

Part 201 Discussion Group

Summary, Recommendations to Subcommittees, and Process Description January 2006

At the request of the director, the Part 201 Discussion Group has identified the following questions, issues, and concerns regarding the content of the Part 201 program and/or the MDEQ's implementation of it. The Discussion Group has organized the issues, concerns, and questions into the five broad topics described below in order to better define and "frame" the issues/problems. With the exception of Item #5 (Funding), the Group has agreed that identification and evaluation of potential solutions to the problems framed by these topics would be more efficiently addressed by focused subcommittees comprised of stakeholders who have appropriate expertise and who are invested in the aspect of the program addressed by the topic. (The Group has agreed that funding concerns will continue to be addressed by internal MDEQ resources, although it acknowledges that funding issues will likely impinge on the work of all subcommittees.)

Each subcommittee will be asked to focus on developing proposals for program improvement, including both the "what" and "how" of implementation. While the overall issue of stable program funding will be addressed outside the subcommittee process, the subcommittees must be mindful of and specific about the resource implications (for both MDEQ and other affected parties) of any recommendations for change. Subcommittees will also be asked to address in their recommendations the most effective vehicle (legislation, rule, etc.) to accomplish change.

Following the delineation of topics, a proposed outline of the process to be employed for the formation and operation of the subcommittees is provided.

TOPICS

1. **LIABILITY/COMPLIANCE.** *Evaluate causation-based liability scheme in light of the past 10 years of experience and determine what changes, if any, are necessary to enhance pace and number of cleanups while assuring that Part 201's brownfield goals are met.*
 - (a) **BEA/Due Care Process:** *There is a general consensus among Discussion Group members that the BEA and due care processes are not working effectively to achieve the objectives of the 1995 amendments which created these provisions. The BEA process has not been shown to provide a reliable means of distinguishing new releases from those releases existing at the time of property transfer. The BEA process does not account for changes in hazardous substance use over time by an owner/operator, limiting the utility of a BEA performed at the time of acquisition. In general, the Discussion Group questions whether liability relief should*

have been the paramount goal of the BEA process in any case. There is some indication that the goal of achieving liability relief may overshadow the more important objective of identifying environmental conditions at "facilities" which represent human health and safety risks. These risks must be appropriately managed and controlled in order to enable the safe use or re-use of these contaminated sites. Accordingly, this subcommittee should re-invent the BEA process in a manner that would (a) continue to provide liability relief to new (non-responsible) purchasers and occupants of "facilities," (b) result in the continued identification and disclosure to MDEQ of "regulated sites" under Part 201, and (c) focus pre-acquisition environmental due diligence efforts on the collection of data and information necessary to support the development of appropriate due care plans.

The Discussion Group recommends that the following questions and observations be a starting point for discussion by the subcommittee.

- Does the BEA process provide the most technically effective and administratively reliable method for implementing the causation-based liability standard from the perspective of the purchaser? The agency? The commercial lending institutions?
- If not, what other options exist that would still maintain the ability of an innocent purchaser to avoid liability for cleanup? Should the resources directed toward pre-acquisition inquiry be focused on identification of due care issues, rather than on distinguishing between existing contamination and new releases? What are the implications on various stakeholders of moving to an alternative approach?
- If BEAs are retained in a revised form, should MDEQ continue to have a role in the review and affirmation of BEAs, or does sufficient experience exist within the private sector (lawyers, consultants, etc.) at this point to eliminate the need for determinations?
- If the BEA process is eliminated, what type of information should be disclosed to the MDEQ on contaminated sites at the time of a transaction for the purposes of liability protection?
- Are the due care obligations imposed on non-labile parties appropriately defined? Do they create a disincentive to brownfield development?
- What is the best method to secure performance of due care response activities in the long term?
- Will determinations granted historically by MDEQ stand the test of time? If the regulatory approach is altered to eliminate determinations by MDEQ, what is the appropriate and fair method for handling sites that have previously received determinations from the MDEQ?

- (b) **Compliance:** *How can MDEQ improve the overall rate of compliance with Part 201? There is a general consensus among Discussion Group members that rates of compliance with Part 201 are unacceptably low. There is also a general consensus that some regulatory requirements are not sufficiently clear or precise to allow regulated parties to clearly understand their obligations or to allow the department to efficiently enforce those obligations (e.g., the requirement under Section 14(1)(g) to "diligently pursue").*

The Discussion Group recommends that the following questions and observations be a starting point for discussion by the subcommittee.

- Evaluate whether compliance can be improved with effective enforcement of affirmative obligations through the aggressive use of existing fines and penalties.
- How can the time and resources needed to identify and pursue non-performing liable parties be reduced?
- How can the complexity of implementing response activities at sites where a liable party is not responsible for all contamination be reduced? Should liable parties be afforded the opportunity to be reimbursed for orphan shares through TIF or through use of State funds designated for orphan sites?
- What methods exist for documenting for MDEQ the entire universe of sites/liable parties subject to regulation under Part 201 so that it can better monitor/enforce remedial response and due care obligations, such as:
 - Mandatory site disclosure requirements
 - Site permit/certificate-of-occupancy concept
- Can reporting/disclosure methods facilitate monitoring and enforcement of liable party obligations under Part 201 without undermining self-implementing approaches?
- Consider providing clearer directives on what constitutes a liable party's affirmative obligations to diligently pursue remedial response obligations.
- Evaluate whether land and resource use restrictions are reliable and effective in the long term to assure protectiveness.
- Consider the option of MDEQ/DAG jointly issuing a policy statement indicating when, how, and under what specific conditions MDEQ/DAG might use CERCLA authorities to pursue liable parties evading their affirmative obligations under Part 201.

- (c) **Finality/Certainty:** *There is a general consensus among the Discussion Group that the program requires a clearer and more effective balance between finality/certainty and the need to assure the protectiveness of*

response activity. As the subcommittee considers options for strengthening the MDEQ's "stick" through enhancements in enforcement and mandatory site disclosure (above), it should also consider options for making the "carrot" more compelling to liable parties.

The Discussion Group recommends that the following questions and observations be a starting point for discussion by the subcommittee.

- Finality/certainty is critical to improving the overall rate of compliance with Part 201. Liable parties sometimes avoid or delay execution of obligations because the regulatory process is overly complex and the endpoint is ambiguous. Changes that increase finality/certainty need to reflect the fact that a significant proportion of response activity includes measures that must continue to function to assure that the response activity functions properly and is protective (e.g., operation and maintenance; land and resource use restrictions).
- What steps could be taken to clarify and streamline the MDEQ role in the remedial response process that would demonstrate to liable parties that the regulatory process has a definitive end?
- When, how, and under what circumstances might the State have a compelling interest to grant a liability release for completed cleanups? Should that release be limited and/or conditional?
- An effective cleanup and redevelopment program requires an appropriate balance in risk-sharing between the regulated parties and the public. In light of the many factors that are being balanced (e.g., residual risk associated with some cleanup categories, the sources of uncertainty about the reliability of response activity, the desire of liable parties to fix their long-term costs), what is the most effective way to achieve that balance?
- Should the concept of a RAP be eliminated and replaced with something else to better reflect the regulatory end that is being accomplished?

2. **COMPLEXITY.** *There is a general consensus among the Discussion Group that the complexity of the program is a hindrance to timely implementation of appropriate response activity. The subcommittee will be asked to identify sources of technical complexity within the program and recommend changes that serve to simplify and clarify it without inappropriately reducing its flexibility or compromising overall protectiveness.*

The Discussion Group recommends that the following questions and observations be a starting point for discussion by the subcommittee.

(a) The sheer number of cleanup criteria, exposure pathways, and other considerations appears to be an impediment to efficient selection and implementation of response activity.

- Can better use be made of provisions that allow for the selection of indicator chemicals for a given facility, increasing the efficiency and effectiveness of response activity?
- Should the number of exposure/migration pathways be reduced or, as an alternative, could simple off-ramps be developed that would serve to eliminate pathways earlier in the evaluation process? Would this reduce transaction costs and focus efforts on the pathways that represent risk drivers?
- Should the number of land use categories be reduced (e.g., to just residential and non-residential)? What would be the implications of such a modification on the program?
- Should non-generic cleanup criteria (i.e., facility-specific and/or site-specific criteria) be used more widely? Less often? In either case, how could this be facilitated?

(b) What role can and should probabilistic risk assessment play in the cleanup program? How can probabilistic risk assessment methods be better integrated into the program so as to convey the significant uncertainty associated with cleanup criteria and facilitate better risk management decision-making? How could this be implemented? How would probabilistic risk assessment affect the complexity of the program?

(c) The GSI pathway has been identified as a stumbling block for many response activities because it is the pathway that is least amenable to resolution through exposure controls and land and resource use restrictions.

- How can the regulatory framework for this pathway be simplified without compromising protection and consistency with Part 31?
- While consistency with the water quality standards and related provision of Part 31 is key, there are contextual differences between that regulatory program and Part 201 that make direct application of some Part 31 procedural requirements difficult. Can and should the interface between the two programs be approached differently?

- (d) **Should Part 201 be amended to incorporate a provision similar to CERCLA's Section 9621(e) that provides the following:**

"No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site, where such remedial action is selected and carried out in compliance with this section."

- A provision similar to this CERCLA provision could provide an avenue whereby ARARs could be considered and incorporated into the RAP itself, rather than imposing the need to comply with other regulatory program not designed to accommodate remedial actions (such as NPDES permits, wetland permitting, etc.).

- (e) **How can the ambient and indoor air criteria and their implementation be improved?**

- Are the generic criteria developed for these pathways reliable predictors of actual risk?
- Can the regulatory framework for these pathways be simplified in a way that reduces transaction costs of liable parties trying to demonstrate compliance without compromising protection?

- (f) **What is the appropriate goal of regulation and guidance? Do existing rules and guidance serve to facilitate or encumber the transactional and remedial response processes?**

- The 2002 Administrative Rules were intended to reduce the need for OM guidance. Instead, the rules are so complex that they seem to have necessitated additional guidance.
- Can the rules and guidance be significantly altered to simplify compliance efforts and embody the other concepts being discussed in this process?
- Is there too much technical detail in the rules, particularly in areas where the science is still evolving?
- Should cleanup criteria be included in promulgated rules or is it preferable to have criteria development and updating managed by a process that is more nimble than the rulemaking process (while still assuring openness)?

3. **PROGRAM ADMINISTRATION.** *There is general consensus among Discussion Group members that there is a need to optimize MDEQ administration of the Part 201 program in order to enhance the credibility of the program and achieve program objectives. To that end, the subcommittee should make*

recommendations to improve internal MDEQ processes and program administration to: (a) increase meaningful risk reduction as measured through redevelopment and/or RAPs/IRDCs/Due Care response activities implemented; and (b) establish effective methods and indicia that can be used to measure and benchmark progress. Since the majority of response activity review and approval is conducted in the RRD, most of the remaining elements under this topic refer to the RRD. The subcommittee should take into account that Part 201 is implemented by a number of divisions and offices within the MDEQ.

The Discussion Group recommends that the following questions and observations be a starting point for discussion by the subcommittee.

(a) General Internal Processes

- Can interactions between RRD and the constituents it regulates be more of a partnership and less adversarial in light of the fact that the parties interacting with RRD include a range from non-labile parties whose primary objective is due care compliance in the context of redevelopment to liable parties who have long histories of non-compliance?
- How can RRD establish the most effective balance between regulatory and service-oriented functions?
- Evaluate methods, such as training, to reinforce the notion that RRD's function is to work in partnership with the regulated community to increase levels of overall compliance, and emphasize the importance of facilitating brownfield redevelopment
- How can the DEQ better assure that staff members throughout the department recognize the important distinction that exists between liable parties and non-labile parties?

(b) RRD/MDEQ Review Processes

- How can initial project scoping meetings be employed to identify major issues early in the process on both remedial and brownfield projects?
- What steps could be taken to assure that feedback on plans provided to RRD is as definitive as possible about what a party needs to do to comply with Part 201, both from a remedial perspective as well as a due care perspective?
- Review MDEQ/RRD's internal review and decision processes. Evaluate those processes in light of the multiple purposes they serve (e.g., intra- and inter-divisional consistency, compliance with statute and rule, need for clarity in communication to plan submitter) and

make recommendations for effectively accomplishing appropriate goals.

- There is currently no clear avenue of appeal for a person whose plan is rejected by the RRD. What appeal or dispute resolution process is appropriate, and how can it function, recognizing that certain submittals are covered by unilateral or consent agreements or other enforceable agreements that may, by their nature or content, limit or define appeals and dispute resolution? This evaluation should address the types of decisions that may be subject to dispute, and whether different processes are appropriate depending on the nature of the dispute.

(c) **Measurement/Benchmarking:**

- What indicia/characteristics should be measured and used to assure that Part 201 is meeting its risk reduction goals? (Progress should be measured in terms of meaningful risk reduction, not via pushing of paper documentation.)
- How can benchmarks be developed and implemented to hold both regulated parties and the MDEQ accountable for meeting objectives?

4. **BROWNFIELD.** *Discussion Group members agree that brownfield redevelopment is a critical component of the Part 201 program. Many of the elements to be addressed in the other topic subcommittees are clearly relevant to improving the effectiveness and efficiency of redevelopment. However, there are a number of other issues that deserve special focus. In light of the experience gained to date, the subcommittee will be asked to make recommendations about steps that can be taken to enhance, promote, facilitate, and streamline brownfield redevelopment in Michigan.*

The Discussion Group recommends that the following questions and observations be a starting point for discussion by the subcommittee.

- How can MDEQ divisions work more effectively in partnership with each other as well as with other State agencies (MEDC, Treasury, MDOT, MSHDA, etc.) to facilitate brownfield redevelopment? Value Stream Mapping could be a useful tool in documenting the current Michigan brownfield incentives process and identifying opportunities for significant streamlining and coordination.
- Utilizing Michigan's brownfield redevelopment incentives requires "packaging" the project in several different formats, such as the SBT NOI, Brownfield Grant/Loan applications, SBT pre-application form, Brownfield Plans, 381 Work Plans, etc. Each program has its own forms, formats, processes, etc., for State agencies to review a brownfield project. This increases the transaction costs for brownfield redevelopment, and also results

in some inconsistent decision-making among and between State agencies. Is there an opportunity here to create a single, unified format for transmittal of brownfield project information that can accommodate every program/agency's needs?

- How can all involved parties respond appropriately to the time-sensitive nature of brownfield projects?
- How can brownfield staff training and support be increased to afford priority to redevelopment projects? (See Funding section below.)
- Consider establishment of a team of brownfield facilitators within MDEQ who would be assigned to shepherd sites with a redevelopment plan through the entire regulatory process (including RAPs, grant/loan projects, State-managed projects, and Act 381 projects) and to serve as a liaison with other divisions of the MDEQ and/or other agencies within state government as necessary to see the project through to completion.
- To what degree can/should the definition of eligible activities under Act 381 and other financial incentive programs be broadened to make the programs collectively more effective (i.e., demolition activities, etc.)?
- Current requirements for work plan approvals under Act 381 and Brownfield Grant/Loan projects are seen by some as too cumbersome. Work plan approvals are currently required to be phased into small tasks, thereby increasing administration and transaction costs for the program. Can this process be improved? Is it appropriate to pursue changes in law to permit fewer and more comprehensive work plans covering a broad spectrum of activities to be submitted for approval?

5. **FUNDING.** *Identify, evaluate viability, and prioritize potential new sources of funds. Evaluate existing level of program funding, including staffing costs and funds allocated for MDEQ-managed cleanups. Determine whether current spending is optimized and aligned with priorities.*

The Discussion Group recommends that the following questions and observations be considered by the MDEQ in formulating its proposals for stable funding.

- Flat-rate user fees or fee-for-service arrangements to parties seeking RRD review/approval of work plans, RAPs/IRDCs?
- Charge developers flat rates user fees, fee-for-services, or other such mechanisms to support MDEQ technical support on brownfield sites. How can the impact of such fees be mitigated so as not to impede development? Can/should these fees be eligible expenses for reimbursement via TIF?
- Evaluate options to assure that they are viable, given the current economic/political climate in Michigan.

- Determine where cuts can be made that will have the least impact on the integrity of the program should it become apparent that some level of budget reduction is inevitable.

PROCESS

The Part 201 Discussion Group has identified the following process for formation and operation of subcommittees.

1. *Four subcommittees will be formed. They will be organized around the following topics:*

- A. Liability*
- B. Complexity/technical requirements*
- C. Program administration*
- D. Brownfield redevelopment*

The fifth topic identified by the Group, Funding, will be addressed by internal MDEQ resources, although the Group acknowledges that it will be important for work on funding issues to both inform, and be informed by, the work of all subcommittees.

2. *The subcommittees may consider any and all realistic options for addressing the questions, concerns, or issues addressed under their topic—whether they involve statutory amendments, regulatory modifications, or adjustments in program administration/implementation.*
3. *Subcommittees will be of a size and composition that will maximize efficiency, productivity, and assure that recommendations are definitive, concrete, and practical. Although the size of the group may vary by topic, it is generally agreed that the groups should not exceed 8-12 persons.*

Rather than identifying individuals to participate on the subcommittees, the Discussion Group has elected to identify stakeholder groups from which individual representatives can be put forward.

4. *Professional facilitators (neutral parties, not MDEQ) will be retained to manage the four subcommittees. Members of the Part 201 Discussion Group may also elect to participate in one or more of the subcommittees. Part 201 Discussion Group members and the subcommittee facilitators will be responsible for assuring that goals are met, that continuity with the larger mission is assured, and that communication and interaction among the subcommittees occurs.*
5. *The meetings of the subcommittees will be open to all interested stakeholders to facilitate broad input on deliberations with the hope and expectation that such input will improve recommendations and garner support for subsequent reform*

proposals. Subcommittee meetings will be conducted to allow for specific opportunities for input from stakeholders who are not subcommittee members (e.g., public comment periods at the beginning and/or end of each meeting).

ATTACHMENT C

Characteristics of a Successful Cleanup and Redevelopment Program Summary of Brainstorming – August 2005 Meeting Part 201 Roundtable

Outcome: A program that protects public health, safety and welfare, and the environment, and encourages appropriate brownfield redevelopment.

- Is credible (has appropriate cleanup criteria and other requirements)
- Is reliable over the long term (including land and resource use restrictions)
- Assigns costs only when that action is visible and costs are quantified and assured
- Protects groundwater resources
- Appropriately considers intergenerational equity
- Is enforceable and enforced
- Has resources to address risks for which there is no liable, viable, willing party

Processes and Standards

- Achievable
- Predictable
- Consistent
- Flexible
- Transparent
- Understandable
- Efficient (minimally iterative with decisions made at lowest appropriate level)
- Performance-based with a minimum of prescriptive requirements
- Affords long-term certainty (about business risk for implementer and about risk to public health, safety, and welfare, and the environment)
- Affords appropriate finality

Roles and Relationships

- Operates with mutual respect among all involved parties
- Provides feedback to preventive programs
- Regulated parties are known to regulatory agency
- Reflects proper role for DEQ in regulatory oversight and redevelopment assistance
- Allows timely and effective input from and feedback to all stakeholders
- Is well coordinated among RRD districts, with other DEQ divisions, state, federal, and local agencies
- Meshes appropriately with regulation at other levels of government on which program depends
- Is operated in concert with federal, state, and local financial incentives and resources
- Ensures effective risk communication and education about risk

Rights and Responsibilities

- Is based on expectation that all parties will comply with obligations
- Allows for appropriate allocation of limited public and private resources
- Program effectiveness is measurable and measured against objective standards
- Legislature provides resources to DEQ to carry out assigned roles